

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**



EXECUTIVE FORCE REVIEW BOARD REPORT

<i>Incident Date</i>	<i>UOF No.</i>	<i>Rcvd. from BFO Admin.</i>	<i>Rcvd. from IAD</i>	<i>IAD ROI No.</i>	<i>IAD ROI Closed</i>	<i>Days to the Board</i>
11 Mar 18	18F-0067	N/A	Yes	18-0249	19 Oct 18	41

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**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REVIEW BOARDS.....	3
III.	FINDINGS.....	4
IV.	INCIDENT SUMMARY.....	4
V.	INVESTIGATIVE STEPS.....	6
VI.	SUBJECT MATTER TESTIMONY.....	7
	A. Patrol Procedures.....	7
	B. Bearcat, SIM, Firearms, and PRO.....	12
	C. Bearcat and Patrol Rifle Officer Program.....	16
	C. Command and Control	19
VII.	USE OF FORCE ASSESSMENT	21
	A. Initial Investigation and Detention/Arrest Assessment.....	22
	B. Use of Force.....	22
VIII.	ADDITIONAL ASSESSMENTS AND DELIBERATIONS	36
	A. Internal Affairs Division Training and Policy Recommendations	36
	B. Criminal Investigation Division Procedures	36
	C. Patrol Rifle Officer Program	37
	D. Designated Arrest Teams	38
	E. Equipment Issue and Customization.....	38
	F. Initial Assessment of Misconduct and IAD Findings	38
	G. Board Re-Convention and IAD Additional Analysis and Findings	41
IX.	TRAINING POINTS & DELIVERABLES.....	47

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

I.

INTRODUCTION

On November 28th, 2018, the Oakland Police Department convened an Executive Force Review Board to review an officer-involved shooting incident where the force subject was killed. The initial hearing was spread out over two days, November 28th and 29th, and, after the Board requested additional work completed by the Internal Affairs Division, a third day of the Board was held on January 8th, 2019.

Four sworn officers (three of the rank of Officer and one of the rank of Sergeant) discharged lethal firearms at the force subject (Level 1 uses of force), and a fifth officer discharged a less-lethal specialty-impact munition (SIM or “beanbag” round) at the subject (a Level 2 use of force). This report¹ discusses the hearing and the Board’s findings.

The involved members were:

- Sergeant Francisco Negrete 8956 (Level 1 Firearm Discharge)
- Officer William Berger 9264 (Level 1 Firearm Discharge)
- Officer Brandon Hraiz 9285 (Level 1 Firearm Discharge)
- Officer Craig Tanaka 9484 (Level 1 Firearm Discharge)
- Officer Josef Philips 9446 (Level 2 Less-Lethal SIM Discharge)
- Lieutenant Alan Yu 8605 (On-Scene Incident Commander)

The following personnel attended the hearing:

VOTING MEMBERS	NAME
Bureau of Field Operations 2	Deputy Chief L. Armstrong
Patrol Area 2	Captain C. Bolton
Patrol Area 4	Captain N. Joshi

NON-VOTING MEMBERS	NAME
Training Division Commander	Captain J. Bassett
Internal Affairs Division Commander	Captain S. Millington
Force Investigations Commander	Lieutenant T. Mork

¹ Departmental General Order (“DGO”) K-4.1 *Force Review Boards* (16 Dec. 15), VI.10

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

NON-VOTING MEMBERS	NAME
Technical Writer	Sergeant J. Turner
Video Technician	Sergeant I. Ramirez
Use of Force Coordinator	Police Records Specialist Nicole Causapin
City Attorney's Office	Supervising Deputy City Attorney K. Bliss

PRESENTERS	NAME
Criminal Investigation Division Commander	Acting Captain E. Lewis
Homicide Section Commander	Lieutenant R. Brandwood
Primary Criminal Investigation Division Investigator	Sergeant R. Vass
Secondary Criminal Investigation Division Investigator	Sergeant L. Sanchez
Internal Affairs Division Force Investigator	Sergeant J. Haney
Patrol Procedures Subject Matter Expert	Sergeant A. Jones
Bearcat, Specialty Impact Munitions, Firearms, and Patrol Rifle Officer Subject Matter Expert	Sergeant T. Sotto
Bearcat and Patrol Rifle Officer Subject Matter Expert	Lieutenant M. Beaver
Command and Control Subject Matter Expert	Lieutenant C. Shannon

ADDITIONAL ATTENDEES	
Independent Monitoring Team	Chief S. Kiyler
Independent Monitoring Team	Commander J. Girvin
Oakland Police Commission	Commission Chair T. Smith
Internal Affairs Division	Sergeant J. Skrdlant
Office of Inspector General	Lieutenant A. Mendoza
Internal Affairs Division	Sergeant L. Ausmus
Observer (Retired US Magistrate Judge)	Hon. M. James

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

II.

REVIEW BOARDS

The Oakland Police Department (OPD) is committed to fair, respectful policing. OPD is likewise dedicated to minimizing the use of force. To these ends, OPD convenes Boards to review Level 1² and Level 2³ uses of force; in-custody deaths; fatal vehicle pursuits; and certain matters that the Chief of Police directs a Board to review.

Some of the key points⁴ that the Boards analyze are:

- Whether the use of force or the actions taken by members complied with the law and/or with OPD policy and training;
- Whether the incident presents training opportunities;
- The reason for the initial encounter with the police;
- Whether any member could have made a different tactical decision that may have resolved the situation with less force or none at all;
- Whether any member's actions contributed to the need to use force;
- The supervisors' performance;
- The opportunity to revise policy or to create new policy;
- Equipment functionality;
- The quality of the use-of-force and/or incident investigation; and
- Superior tactics or performance.

This review is meant to enhance the OPD's practices and service to the community. Force Review Boards ("FRB") review Level 2 uses of force and certain other uses of force as directed by the Chief of Police; Executive Force Review Boards ("EFRB") review the other incident types listed above.⁵

² DGO K-4, Reporting and Investigating the Use of Force, II.A.

³ *Id.* at II.B.

⁴ DGO K-4.1, *Force Review Boards*, I.C, VI.A.3-4.

⁵ *Id.* at I.D-E.

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

III.

FINDINGS

After carefully reviewing the evidence and deliberating, the Board agreed with Criminal Investigation Division (CID) and Internal Affairs Division (IAD) investigators that all the uses of force during this incident (four Level 1 uses of force and one Level 2 use of force) were reasonable under law and in compliance with policy.

The Board reviewed the findings of the IAD investigation and unanimously agreed that the on-scene incident commander, a Lieutenant, did not properly command the scene and was culpable of class two misconduct. The Board determined, on a 2-1 majority vote, that the on-scene supervisor of the designated arrest team (DAT), a Sergeant, did not properly supervise the team in a manner which was so grossly derelict that he was culpable of class one misconduct⁶. The Board also determined on a 2-1 majority vote, that one of the DAT officers improperly deployed his patrol rifle without notifying communications as directed by policy, an instance of class two misconduct.

IV.

INCIDENT SUMMARY

On March 11th, 2018, at approximately 1817 hours, OPD officers were dispatched to the area of 928 40th Street, City of Oakland, on the report of a person armed with a firearm. Information initially came from a citizen, via Oakland Fire Department (OFD) dispatch, that a person (later identified as force subject Pawlik) was down on the ground, between two houses on the east side of 928 40th Street, apparently unconscious, and armed with a handgun. The caller, [REDACTED] (5)(B) gave a description of the subject, cautioning that he was unable to verify whether the item in Pawlik's hand was indeed a gun.

OPD Officer J. Philips, working as call sign 2L12, was dispatched to the scene in "Code 3" status (emergency lights and sirens activated), and arrived at approximately 1821 hours. Officer Philips approached on foot, leaning over from the front steps of 928 40th Street to peer down the area between the two buildings. There, visible from the street, Officer Philips saw Pawlik, and observed that Pawlik had a semi-automatic handgun in his right hand. Officer Philips reported his observations over the patrol radio, and noted that Pawlik might be under the influence of alcohol.

Officer Philips retreated to his parked patrol car, and moved it backwards in the #2 lane of westbound 40th Street until it was parked in front of the opening where Pawlik was lying. Using the vehicle as cover, Officer Philips maintained an observation post to monitor Pawlik's actions

⁶ As described in section **VIII – ADDITIONAL ASSESSMENTS AND DELIBERATIONS**, the dissenting Board member did not agree that the Sergeant's actions rose to the level of gross dereliction of duty, but did agree that the Sergeant was culpable of class two misconduct.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

while additional units arrived. The next unit on scene was Sergeant H. Webber 8223, who gave direction to Officer Philips and also stood by waiting for additional resources.

Sergeant F. Negrete, working as Crime Reduction Team 1 (CRT1) supervisor call sign 6L71, heard the situation developing via the patrol radio, gathered two of his direct subordinates, Officer W. Berger and Officer B. Hraiz, and responded to the scene. Sergeant Negrete, assigned an AR-15 rifle due to his ancillary duties as a member of the OPD Tactical Team (SWAT) Entry Element, reported that he and the two officers (Berger and Hraiz were assigned AR-15 rifles as members of the Patrol Rifle Officer, or PRO, program) were bringing their rifles to the incident.

In the meantime, additional patrol officers arrived on scene. A large perimeter was set around the 900 block of 40th Street, with a rear perimeter (supervised by Sergeant A. Pierce) set up in the 900 block of 41st Street. Officers also set up traffic control points to keep traffic and pedestrians from entering the 900 block of 40th Street. The officers on scene requested for medical assistance to stage, away but ready, in the event that Pawlik was suffering from a gunshot wound or other trauma. Lieutenant A. Yu, the Bureau of Field Operations 1 (BFO 1) watch commander, arrived on scene and became the incident commander.

Once on scene, Sergeant Negrete began formulating a plan to take Pawlik into custody. To this end, Sergeant Negrete formed a Designated Arrest Team (DAT) which included himself (as the officer in charge of giving commands), Sergeant Webber (SIM beanbag), Officers Hraiz and Berger (primary cover with their AR-15 rifles) and Officer Philips (electronic control weapon, or ECW). Sergeant Negrete also requested that Officer Craig Tanaka, another of his direct subordinates and a PRO, go to the Eastmont substation to retrieve the Bearcat, an armored vehicle which can withstand impacts from small arms fire.

While the DAT was waiting for the Bearcat, other officers were busy attempting to evacuate inhabitants from nearby residences and controlling access to the area. During this time, Sergeant Negrete discussed several contingencies with his team, he also met with Lieutenant Yu to discuss the plan of action for taking Pawlik into custody once the Bearcat arrived. While they waited, Pawlik shifted enough so that officers knew he was alive, but did not wake up or otherwise respond to the presence of the officers.

At approximately 1904 hours, Officer Tanaka arrived on scene with the Bearcat. Sergeant Negrete directed Officer Tanaka to replace Officer Philips' patrol SUV, #1447, with the Bearcat, placing the Bearcat as a piece of cover between the position of the officers in the street and where Pawlik was lying. Sergeant Webber moved the patrol SUV as Officer Tanaka, under the guidance of Sergeant Negrete, maneuvered the Bearcat into position. Once the Bearcat was in position, Sergeant Negrete directed Officer Hraiz to the Bearcat's turret.

Once Officer Hraiz got into the turret, Sergeant Negrete had Officer Tanaka move the Bearcat forward a few more feet, to give Officer Hraiz a better angle of view of Pawlik. As this occurred, Officer Berger noticed that Pawlik was moving, and called out "movement" to alert the rest of the team. Sergeant Negrete, who was standing behind the Bearcat at the front passenger-side quarterpanel, called Officer Berger to his position of cover behind the engine block. Officer

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

Tanaka turned off the engine just as Pawlik moved again, and the officers began to verbally direct Pawlik.

For the next approximately 48 seconds, the officers gave Pawlik at least 12 commands, including, "Police, don't move", "Get your hands up", and several slight variations of "Get your hand off the gun" including one in Spanish. Pawlik did not reply to the officers, nor did he drop the gun or relinquish his grasp on it. Officers reported seeing Pawlik sit up, slightly, as if he were going to start getting up from the ground.

By this time Officer Tanaka, who had driven the Bearcat to the scene, had gotten out of the Bearcat through the passenger-side door and was just to the left of Sergeant Negrete, who was himself to the left of Officer Berger. Officer Hraiz was in the turret of the Bearcat, and Officer Philips, who had been just behind Sergeant Negrete and Officer Berger, had moved to Officer Berger's right with the SIM-loaded shotgun.

As the officers continued to give commands, Pawlik moved his head up and down, looking in the direction of the Bearcat and the officers. Pawlik was lying on his back and rolled slightly on his right side with his body almost perpendicular to the length of the small walkway between the two houses where he was lying. The officers reported that, even though they gave Pawlik commands to get his hands off the gun, Pawlik did not remove his right hand from the handgun. Suddenly, Pawlik rocked his head and upper body forward, as if he was going to get up, and the officers reported seeing the barrel of the gun in Pawlik's hand raise to point towards them. The officers also reported that Pawlik looked directly at them, that he appeared "agitated", "irritated", or "upset", and that he seemed to understand what was happening. Officers Hraiz, Berger, Tanaka, and Sergeant Negrete reported feeling that their lives and the lives of the other officers were in danger, and they all fired several rounds from their AR-15 rifles at Pawlik within the span of approximately three (3) seconds. Pawlik was struck by several rounds.

Sergeant Negrete put together a small team of officers and advanced with them behind a ballistic shield towards Pawlik's location. Once there, the officers separated the handgun from Pawlik and saw that he had sustained severe injuries. Sergeant Negrete requested that medical personnel come in to provide aid to Pawlik, but Pawlik succumbed to his injuries and was later pronounced dead on scene.

Lieutenant Yu initiated a Level 1 Force call-out, and CID and IAD investigators responded to the scene to begin the investigations.

V.

INVESTIGATIVE STEPS

Among other materials, the Board reviewed: the CID Investigative Action Report (IAR), the Force Investigations Section Report No. 18-0249, PDRD footage, the OPD file for RD Number 18-012685, witness statements, audio and video recording of personnel statements, surveillance video, and radio traffic related to the incident.

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

In addition, the Criminal Investigations Division (“CID”) and Internal Affairs Division (“IAD”) presented to the Board. The Board also heard from subject matter experts.

VI.

SUBJECT MATTER EXPERT TESTIMONY

At the conclusion of the CID and IAD investigation presentations, and prior to the Board’s deliberations, subject matter experts testified in front of the Board.

A. Patrol Procedures

Sergeant A. Jones appeared before the Board as the Subject Matter Expert on Patrol Procedures and its attendant training. A member of the Oakland Police Department since 2003, Sergeant Jones worked in a Crime Reduction Team (CRT) for nine years, became a Patrol Rifle Officer (PRO) in 2006, and became a member of the Tactical Team (SWAT) Entry Element in 2008. He has been a member of the Patrol Procedures training staff since 2010, and became the lead Patrol Procedures instructor in 2016. Sergeant Jones is now an assistant team leader on the Entry Team, and he reviewed the materials prior to his appearance at the Board.

The Board asked Sergeant Jones to explain the training that supervisors (sergeants) receive in terms of Designated Arrest Teams (DATs). Sergeant Jones explained that all officers are introduced to the concept and use of DATs in the basic academy. Sergeant’s CPT has refresher training on DATs and critical incident management, as well as instruction on the roles of team members. (CPT is continuing professional training, a training evolution that officers are sent through every year to receive updates and refresher training.)

Sergeant Jones noted that training for all officers regarding DATs includes the role of the team leader, the roles of other officers in the team, and the criteria an officer or supervisor might use when selecting officers for the DAT. While there is no specific training to supervisors regarding supervision of DATs, they are taught more broadly about supervising critical incident scenes. This training includes explanations of the roles that officers can fill, and how supervisors should identify and lean on officers with specialized training and skills (e.g. SWAT or PRO) and place those officers in positions where they can lead and make critical decisions. Experience and abilities should dictate roles.

The Board asked for the specific roles that exist in a DAT. Sergeant Jones explained that at minimum there should be a designated “talker/cuffer” officer, whose job is to communicate with the subject, direct the movement of the subject, and handcuff the subject once feasible. Another officer should be designated as the less-lethal force user, should the situation turn into one where less-lethal force is necessary; the specific force option(s) chosen vary based on the circumstances of the particular encounter. A third officer is designated as the “primary cover”, whose main focus is protecting the entire team by being ready to engage the subject with lethal force if the actions of the subject dictate that necessity. Finally, a fourth officer (this does not have to be a supervisor, though it can be) should be the team leader, responsible for making sure that the other roles are filled and that the officers comprising the DAT are put in the most advantageous

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

positions possible. The team leader also is typically the person thinking of possible contingencies, based on the scenario at hand, and formulating response plans.

Regarding a supervisor specifically as part of a DAT, Sergeant Jones noted that, if a sergeant is a member of a DAT then they are an active member of that team. While ideally the sergeant gains an overall strategic view of the incident to allow a “big picture” management of the incident, this does not preclude the sergeant from defending him or herself, other officers, or the public. When asked when something like this might occur, Sergeant Jones explained that, if a subject decided to present a lethal threat and run towards the sergeant and other members of the DAT, the sergeant might have to use lethal force to defend him/herself and the team.

The Board asked what the training and process is for the DAT’s team leader briefing the team. Sergeant Jones stated that, typically, as officers arrive on scene, a DAT is formed quickly, with one officer taking charge. That person, the de facto team leader, assigns roles and attempts to get a minimum of four officers on the team. Once roles are assigned, contingency plans – for scenarios such as if the subject surrenders, if the subject attacks officers, or if the subject flees – are discussed and planned. Additionally, a plan for resolving the situation in the most ideal manner is typically formulated and, once sufficient resources are on scene, executed.

The Board asked for additional details on exactly how the DAT team leader briefs the team. It was explained that, ideally, the team leader gathers the team together and briefs everyone at the same time. However, there are often impediments (such as time constraints, or if a team member is on a critical assignment and cannot be pulled away) which preclude this. Instead, the team leader can approach the team members individually and brief them on their assigned roles and on the plans and contingencies. In terms of the team leader briefing the incident commander, Sergeant Jones noted that this was ideal, but not always feasible. If possible, the incident commander should be briefed on the team’s plans so that feedback can be given, or so that the incident commander can alter the plan if necessary. However, this is not always feasible if the incident commander is not on scene or if the scene is rapidly evolving and no incident commander has yet been identified.

In response to a question about training on encounters with unresponsive, armed individuals, Sergeant Jones said that, while there has been reality-based training (RBT) with similar instances during training, there is no specific block of instruction on these encounters.

The Board asked Sergeant Jones to elaborate on some of the typical contingencies that the team leader of a DAT might be expected to consider. He replied that contingencies are dependent on the type of incident, terrain, and circumstances, but the contingency of how to safely take the subject into custody if he or she complies with the orders of officers is almost universally discussed. This includes talk of where to position the person for handcuffing. Another frequently discussed contingency is if the subject presents a firearm or other lethal threat, and typically involves identifying primary and secondary cover officers whose job it is to respond to lethal threats.

The Board asked about the process of setting the primary and secondary cover officers. Sergeant Jones explained that, while any officer can and should react according to training when they

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

perceive a threat of great bodily injury or death to themselves or anyone else from the subject, ideally a minimum number of officers using lethal force will engage the subject if necessary. The team leader typically will communicate directly to the primary and secondary cover officers that they are filling those roles, and ideally those two officers would be set up with different vantage points, to see anything that the other officer might not be able to.

Continuing with typical contingencies of a DAT, Sergeant Jones explained that another common contingency is if the subject gets up, is not compliant with commands, and poses a less-lethal threat or advances on officers. Typically, the team leader will authorize the use of less-lethal force, and may use a landmark to draw a figurative “line in the sand” which, should the subject cross it, would prompt the officer to subdue the subject with less-lethal force. In that case, the team leader would identify the landmark to the less-lethal force officer, and give specific instructions on when and how force should be used if the subject crossed the “line.”

Finally, a general contingency that is frequently discussed in circumstances where a DAT is formed is what officers should do in response to the subject attempting to flee. The goal of the DAT at that point is to contain the person within a perimeter and not simply chase the subject into backyards or enclosed spaces. Instead, containment should isolate the subject until the DAT can be set up and again challenge the suspect, with the overall goal of peaceful surrender.

In terms of the composition and positioning of the DAT, Sergeant Jones remarked that members of the DAT ideally are only assigned one role. However, this can be fluid, especially if circumstances change quickly. Also, depending on the terrain, positioning of the officers, and actions of the subject, assigned roles can switch between team members – Sergeant Jones said that this type of switch typically is directed by the team leader. Regarding the positioning of the team, Sergeant Jones explained that the team is typically close enough together for verbal communication but far enough away to provide slightly different vantage points – an example he cited was officers on both ends of an armored vehicle, using the body of the vehicle for cover.

In terms of initiative from individual team members, Sergeant Jones noted that DAT members can give instruction to other team members, but that ideally these instructions should be communicated with the team leader as well so that the leader is apprised of the entire plan. Similarly, officers could self-deploy to fill a gap or position in the DAT, but ideally would communicate what they are doing to the team leader, so that the team leader knows the personnel grouping and roles of the entire team.

The Board asked about any other training in the Department regarding police response to armed, non-responsive persons. Sergeant Jones replied that training specifically regarding armed, non-responsive persons exists in RBT scenarios in the basic academy – he described these scenarios as consisting of an armed unconscious person in a vehicle, and said that recruits are taught how to resolve these situations. The Board asked whether this training existed in other training environments in the Department, and Sergeant Jones said he had no knowledge of this training occurring outside of the basic academy.

Regarding the above RBT training recruits receive in the basic academy on responding to armed, non-responsive persons, the Board asked what guidance, if any, recruits were given about what

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

to expect when confronting an armed, unconscious person. Sergeant Jones replied that recruits are told that these subjects are likely under the influence of some substance – he noted that in his experience these types of subjects are usually sleeping in vehicles. Training teaches that subjects might not wake up in response to commands, or that they might suddenly awaken startled and so create an exigency that has to be dealt with. Additionally, the person might be faking unconsciousness to lure the officers in closer.

The Board asked Sergeant Jones to expand on the concept of the subject being startled. He explained that officers are taught that the subject suddenly awakening and being startled is a contingency that officers must be aware could occur. Specific actions to be taken in response to this, however, are not given as so much depends on the circumstances of that specific encounter. General guidance is taught which directs the officers to protect themselves first and foremost. For instance, if, as the officers are approaching the subject, the subject awakens and points the firearm at the officers, that would be a lethal threat that the officers must protect themselves from.

The Board asked how this guidance about protecting oneself would apply if the officers were behind cover and/or concealment. Sergeant Jones replied that the training is still that officers must protect themselves and other officers; while cover and concealment might lower the risk of being struck if the subject opens fire, they do not entirely negate it. The Board asked specifically, then, if training on responding to lethal threats did not vary based on whether the officers were in cover or in the open. Sergeant Jones explained that this was correct – if a lethal threat presents itself, the officers are taught to address the threat in accordance with law, policy, and training, regardless of whether they are behind cover or in the open.

The Board asked whether any specific direction on supervising a DAT was written down in training documents or lesson plans. Sergeant Jones explained that, since so much of what is done by a DAT is based on the specific circumstances for that encounter, the training is not formalized to that degree.

The Board asked about RBT scenarios involving armed and unconscious persons, and Sergeant Jones explained that these scenarios can be done in conjunction with simunitions – equipment that simulates the firearm but uses marking cartridges instead of bullets – to enhance realism. The scenarios do not have suggested responses, but there is a general set of guidelines when dealing with armed, unconscious persons: set containment to isolate the subject from others and avenues of escape, assemble a DAT, then awaken and safely take the person into custody. Typically, this involves amplified announcements from a safe distance away. Generally, time is on the side of the officers in these situations.

The Board asked more specific questions about the role of the team leader, and whether the team leader could assume another role in the DAT. Sergeant Jones responded that, while having the team leader fill one of the other roles in addition to his/her role as the leader is not taught, it can happen depending on the circumstances of the encounter. Asked specifically about the team leader also serving as the talker/cuffer, Sergeant Jones said that, while not ideal, the team leader might develop rapport or have a specific set of skills which would dictate that they serve as the communicator as well as the team leader. However, the team leader typically should be focused

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

only on that role; a consequence of the team leader taking on an additional role might be that they lose sight of the overall strategic picture while dealing with a specific tactical responsibility.

The Board asked if the Bearcat armored vehicle was used or discussed during patrol procedures instruction, to which Sergeant Jones replied that there is a block of training on use of the Bearcat in officer CPT, and that use of the Bearcat is discussed with recruits in the basic academy.

Sergeant Jones was asked about whether scenarios involving shoot / no-shoot decisions were presented during patrol procedures training. Sergeant Jones replied that the majority of the scenarios run during patrol procedures training are no-shoot scenarios if the officer or trainee demonstrates the proper actions based on the training they have received. The patrol procedures program is specifically designed to not correlate the fact that a person is armed with a firearm with a use of lethal force by the officer. To that end, the majority of scenarios involving armed subjects are no-shoot scenarios if the officers properly utilize their training.

Expanding on this, Sergeant Jones explained that officers are trained on tactics to reduce the likelihood of lethal force encounters. This includes teaching officers to scan for threats and aggressive movements during all types of encounters with people, to provide as much warning as possible that a threat may be imminent. Additionally, officers are taught to protect themselves by drawing their handguns in the face of a lethal threat while also giving commands and attempting to forestall the threat, when feasible. They are also trained to move to cover or concealment, or to at least create time and distance and then put the subject into a position of disadvantage, where the officers can safely handcuff them.

The Board asked Sergeant Jones to explain more about the idea of time and distance. He replied that officers are trained that distance between a threat and the officer is beneficial because officers have training on shooting at greater distances. Distance typically lends itself to increased time to make decisions and react to changing circumstances. Finally, Sergeant Jones explained that, with a subject who is unconscious or otherwise compliant, there is no exigency for the officers to approach that person to affect an arrest, but instead officers can call the person back to them.

Regarding commands, officers are taught in patrol procedures training that one officer should be designated to give commands. Commands to safely position and ultimately secure a subject are first taught in defensive tactics, and reinforced in patrol procedures. At present, officers are taught to identify themselves and give an immediate command to stop moving: "Police, don't move!" Next, depending on the position of the hands, officers are taught to address the hands of the subject, and to maneuver the subject such that the person can expose their hands and put their hands in the air. Finally, officers are taught to put the person in a position of disadvantage, such as the kneeling or prone position, and then safely handcuff the person in conjunction with other officers. Sergeant Jones explained that this is the general sequence to commands, which can be changed depending on the specific circumstances present. For instance, Sergeant Jones noted that, if a subject were lying next to a gun, an appropriate command to not touch the gun might be inserted early on.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board asked if Sergeant Jones could recall any training scenarios which resulted in all members of the DAT engaging in lethal force against the simulated “suspect.” Sergeant Jones replied that this had likely happened, but he could not recall a specific instance. Regarding feedback given to trainees after such a scenario, he noted that the practice of the training staff is to query each trainee who used force, at the conclusion of the scenario, why they used that force and what their rationale and reasoning was. Trainees are required to give specific justification as to why their force is lawful and within policy.

Finally, Sergeant Jones was asked to give the purpose of a DAT. He explained that a DAT’s goals include accepting the peaceful surrender of the subject or affecting the arrest, preventing the escape of the subject, and managing contingencies, to include if the subject flees, takes hostages, or becomes a lethal threat.

B. Bearcat, Specialty Impact Munitions, Firearms, and Patrol Rifle Officers

Sergeant T. Sotto appeared before the Board as a subject matter expert on the Bearcat armored vehicle, the Patrol Rifle Officer Program, Firearms, and Specialty Impact Munitions (SIM). Sergeant Sotto has been a member of the Department since 2002, and spent nine years in uniformed assignments including patrol, CRT, and problem-solving officer (PSO), before being transferred to the Training Division as a firearms instructor. As an instructor, Sergeant Sotto taught all aspects of firearms training to recruits in the academy and to officers in CPT, and assists in teaching the patrol rifle officers and in the Department’s SWAT school. Sergeant Sotto is a POST-certified firearms, patrol rifle, chemical agents, and less-lethal SIM instructor, and is a certified Glock and Remington 870 shotgun armorer. He has had hundreds of hours of practical training to include the San Jose PD MERGE rifle school, MACTAC training, and eight appearances as a participant in Urban Shield. Sergeant Sotto served as an Infantry Squad Leader in the US Army, went to Ranger School while serving, [REDACTED] (5)(C). He reviewed the materials prior to his appearance at the Board.

The Board asked about the training that PROs receive in regards to DATs. Sergeant Sotto answered that PROs are typically asked to be primary or secondary cover in a DAT. If there are more than two PROs on scene, the additional are often called up to fill the other roles in the DAT because PROs receive more frequent and intensive training on DATs than do other officers.

Regarding the qualifications and training for PROs, Sergeant Sotto said that candidates for the program go through a testing process which includes a work history examination, oral board, physical agility test, and reality-based training scenario. Candidates are ranked based on their performance in the testing process, and the highest ranked candidates are selected to attend a 40-hour school, which consists of classroom-based learning on the history of the program and the mechanics and ballistics of the weapon, manipulations and safety, familiarization fire, live-fire standards, low-light fire, and tactics. The school ends with a written test, manipulations test, and a live-fire qualification.

Those passing the school can be selected as PROs and issued a rifle. Once so assigned, PROs are required to attend a one-day quarterly training, which consists of discussion and debrief of rifle deployments in the previous quarter, live-fire or stress-inoculation drills, manipulations,

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

live-fire standards, and a qualifications course. In the afternoon, the training typically addresses particular tactical issues, such as yard searches, building searches, or designated arrest teams. Scenario training is included, and each quarterly training is different than the one before.

The Board asked for a description of some scenarios involving armed suspects that PROs might see during training. Sergeant Sotto gave an example of a scenario of a patrol call for service which becomes a barricaded domestic violence suspect armed with a gun. The scenario might evolve further into a hostage rescue operation where the students have to enter the structure to rescue the hostage and deal with the armed threat. Additionally, due to a trend of armed subjects asleep in cars, the firearms staff has run many scenarios with an apparently sleeping armed person in a vehicle in PRO training as well as in CPT. Per Sergeant Sotto, the scenario is designed such that, ideally, the officers approach, see the sleeping person and note that he/she is armed, retreat to cover, call for additional resources, contain the scene, set up a DAT, and then endeavor to take a methodical approach to resolving the situation.

Sergeant Sotto explained exactly how a scenario with a sleeping armed person might be run. First off, a script is produced for the role players, so that their actions are consistent throughout training and designed to prompt the specific reactions from students. Strict safety protocols are enforced for role players, instructors, and students, and the class is sectioned into groups. Typically, a group of four students is brought out at a time, with two brought to where the scenario is set up. There, cars are positioned such that the officers have just made a traffic stop, and the first two officers approach the car. Ideally, they see that the subject appears to be armed and is asleep, and they retreat to the cover of their patrol car and request additional units via radio. The second two officers are brought in as cover officers, and together all four officers are expected to create and execute a plan to safely take the person into custody. This type of training is given in both sergeant and officer CPT as well as in PRO training. The purpose of this is to apply the DAT concept – filling roles, communicating, discussing contingencies, and then executing a plan – to a multitude of different scenarios.

The Board inquired further about the DAT concept, and Sergeant Sotto explained that this concept is designed to get officers to plan and anticipate contingencies, as well as to fill roles and bring specialized equipment to bear on a problem. When asked who in the DAT was responsible for planning for contingencies, Sergeant Sotto responded that initially this must be handled by the officers who are on scene. Once a more experienced officer, or a sergeant if the sergeant has the requisite experience and skill, arrives, then that person can take over as the team leader.

Sergeant Sotto gave information on the use of the rifle, explaining that the PRO qualification course includes shooting from seven out to 50 yards, and that the rifle can be effective beyond that range.

In response to a question about how many PROs can be included in a DAT, Sergeant Sotto replied that it depends on the terrain and circumstances, including what the subject is armed with. If additional PROs are available, then additional DATs can be set up to cover different angles or possible escape routes. There is no optimal number or limit to the number of PROs on a DAT. If PRO or SWAT team members are available, however, it is preferred to have those officers on the DAT due to the higher amount of training they receive.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

Regarding the number of rounds officers are taught to fire when engaging a lethal threat, Sergeant Sotto explained that for all firearms platforms officers are not trained to fire a specific number of rounds, but instead are taught to continue firing as long as a lethal threat presents itself and stop firing once the lethal threat no longer exists. Officers are taught to continuously assess while they are firing, and to stop when they perceive that the threat has ended or been neutralized. The training also demonstrates that some delays, due to things like perception delays or view obstruction, may exist that keep the officer from immediately realizing that the threat is no longer present.

In terms of engaging a lethal threat with the patrol rifle, PROs are taught the different ballistic capabilities of the rifle but they are not trained to change their cadence or expectation of fire when using the rifle as opposed to the handgun to face a lethal threat. Although the rifle does have different ballistic capabilities, the characteristics and capabilities of the subject facing force – such as mental illness, susceptibility to pain, or internal drive to continue fighting – cannot be reliably determined prior to a lethal force encounter. Instead, PROs are taught to use appropriate force until the threat is no longer present, which is the same way they are trained to use their handguns when presented with a lethal threat.

Sergeant Sotto was asked about PROs self-deploying into a DAT. He explained that this can occur, although the arriving PRO will ideally get some briefing from other officers already on scene. However, there has been training, such as for active shooters, where a responding officer might not get a full briefing on the situation and needs to fill in with as much information as they can get on the fly. For a less-exigent circumstance than an active shooter, PROs are still allowed to self-deploy, but should get briefed as soon as is feasible – until they are assigned a specific role, the PRO would be expected to play the role of an extra, or utility, officer. Sergeant Sotto explained that Department General Order (DGO) K-06 specifies that PROs deploying their rifle advise of that fact over the radio when feasible.

Moving to the Bearcat, Sergeant Sotto explained that the Department first acquired it in approximately 2008 or 2009, and that his first experience with it was from SWAT training, where the SWAT team members were allowed to familiarize themselves with driving and using the vehicle. Sergeant Sotto said that the Bearcat's armor is rated to stop up to a .50 caliber bullet, and that the windows are all ballistic rated to stop rifle rounds as well. The SWAT team uses the Bearcat at almost all training days and for scenario training, and in approximately 2016 the Department began allowing PROs to take the Bearcat to critical incidents that did not warrant a full SWAT callout.

Sergeant Sotto noted that the SWAT team uses the Bearcat on almost every callout, and that team members are trained on its use and capabilities. Team members also have experience with live-fire drills using the Bearcat as cover. Typically, the Bearcat is set up broadside to the threat, so that operators can use the engine block, hood, turret, and back as cover points to engage the subject. While SWAT team members have trained in shooting from the portholes cut in the side armor of the Bearcat, this is an unconventional shooting position which is not the ideal platform for proper use of the rifle. SWAT team members receive training in positioning the Bearcat

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

during many of the scenario trainings they attend throughout the year, and debrief every time that the Bearcat is used during a callout after the incident is concluded.

For PRO training with the Bearcat, initially the training was set up to mirror the familiarization given to SWAT team members. PROs were trained during the September 2016 quarterly training, and learned about driving and utilizing the Bearcat as cover. Sergeant Sotto explained that the main benefit to the Bearcat is that it can be used as a large piece of cover, especially compared to a patrol car or SUV, so that the officers can spread out and get different angles from which to see the subject. The only true point of cover on a patrol car or SUV is the engine block, whereas the Bearcat offers cover across its length.

Beyond SWAT and PRO officers, rank-and-file officers and sergeants are taught during critical incident training in CPT about how to utilize the Bearcat. Since CPT is conducted almost every week with a new group of officers or sergeants, the Bearcat is not brought out but instead thought exercises are conducted in the classroom. When conducting practical exercises, an SUV is used as a stand-in for the Bearcat. Officers and sergeants are taught about the ballistic capabilities of the vehicle and how it can assist officer safety in critical incident scenarios.

Sergeant Sotto explained that SWAT and PRO officers are authorized to retrieve the Bearcat for deployment to the field absent a SWAT callout. Typically, when an officer, supervisor, or commander on scene recognizes the need for the Bearcat they will request that a PRO or SWAT team member currently working retrieve it from the Eastmont substation. These deployments are typically made with the assent of the watch commander or on-scene incident commander, although there is no formal policy requiring consent from a command officer. Typically, a sergeant will consult with or advise the watch commander if the Bearcat is going to be deployed.

Sergeant Sotto explained that the purpose of the Bearcat is to enhance the safety of officers at the scene and to enhance the safety of the public. Since the Bearcat is fully armored, officers can drive it in to an area where there is an active shooter and rescue people, for example.

Moving on to SIM, the Board asked for the purpose of SIM in a police setting. Sergeant Sotto explained that SIM are used as a less-lethal force option, and that in many situations SIM can be more advantageous than other less-lethal options such as Oleoresin Capsicum (OC), baton, or the electronic control weapon (ECW) because of the greater range that SIM allow. The Department currently uses two less-lethal 12-gauge SIM, the Safariland / Def-Tec Drag-Stabilized Flexible Baton round and the CTS Super Sock, which have nearly identical capabilities. Both are small cloth pouch projectiles, with tails for stabilization, containing 40g of #9 lead shot. The projectiles are encased in a 12-gauge shotgun shell and are shot through the department-issued Remington 870 shotgun.

The bulk of the Department's sworn members are trained and qualified on the SIM – officers and sergeants are trained and re-qualify in CPT, and since 2016 all trainees graduating from the basic academy have received initial SIM qualification prior to graduation.

Concerning the use and capabilities of the SIM munitions, Sergeant Sotto explained that SIM are a necessary tool for situations where the need to use less-lethal force may arise but where

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD

OAKLAND POLICE DEPARTMENT

Use of Force No.: 18F-0067

28-29 November 18, 8 January 19

officers do not necessarily want to get too close to the subject. This includes incidents where persons are barricaded in a structure, or where the person may possess an edged weapon. Sergeant Sotto described the SIM capabilities as being similar to that of a baton, but with the ability to deploy from distance. The SIM creates blunt-force trauma, which hopefully creates a psychological imperative for the subject to cease his or her resistance. Unlike an ECW, the SIM does not cause involuntary incapacitation. Sergeant Sotto explained that, even for a person armed with a firearm, having SIM available is good practice – for an unconscious or un-responsive armed subject, the SIM might be used to overcome their non-compliance, as officers at that distance often cannot determine whether the person is truly unconscious or is pretending. In this case, Sergeant Sotto explained that the SIM is not used simply to wake someone up, but might be used after other, less-intrusive means like the siren, shouting, or loudspeaker were used without compliance.

Asked about nicknames that officers use for the SIM, Sergeant Sotto replied that “thump” is often used as a verb in real and training scenarios when describing utilizing the SIM against an individual. He said that he had not heard the term “bag” used in this setting, but that due to the large instructor cadre and the amount of different levels of experience and sheer number of officers at the Department, it would not be surprising if “bag” was also used as a similarly-applied verb.

Returning to the deployment of the patrol rifle by PROs, Sergeant Sotto explained that the Department does not keep a record of the number of rifle deployments. Individual PROs keep a log book of deployments and a round count to ensure that the rifle is properly maintained. An individual PRO’s deployment log stays with that officer, and the PRO instructors will sometimes examine the logs at quarterly trainings. Sergeant Sotto stated that he was unsure whether a deployment log of PRO deployments was being forwarded to the BFO Deputy Chiefs, as is specified in DGO K-06.

The Board asked specifically about DGO K-06, section VIII, B, which states that, as soon as practical, a PRO deploying the patrol rifle shall advise the Communications Division. The Board inquired as to whether PRO training emphasized this direction. Sergeant Sotto explained that many times the fact that the PRO will be deploying their rifle is implied, and referenced the scenario of calling for a PRO to retrieve the Bearcat – it is implied that the PRO will also be deploying his or her rifle. Additionally, if a supervisor or commander calls for PROs to respond to the scene, it is implied that they will be deploying their rifles.

C. Bearcat and Patrol Rifle Officer Program

Lieutenant M. Beaver appeared before the Board as a subject matter expert on the use of the Bearcat armored vehicle and on the Department’s Patrol Rifle Program. Lieutenant Beaver has been with OPD since 1997, and has worked a variety of uniformed assignments including patrol and CRT. He became a PRO in 2000 and a member of the Tactical Team (SWAT) Entry Element in 2001. Lieutenant Beaver attended firearms instructor school in 2001 and began teaching in the police academy. In 2002 Lieutenant Beaver, then an officer, was selected as the PRO coordinator, a position he continues to hold as an ancillary assignment. In 2007, Lieutenant Beaver was promoted to Sergeant, and became a team leader on the SWAT Entry Element. He

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

has been an instructor in the Department's SWAT school since 2008, and has attended five California Tactical Officer Conferences. In 2018, he was promoted to the rank of Lieutenant, and is currently a tactical commander for the SWAT team. Lieutenant Beaver reviewed the materials prior to his appearance at the Board.

Lieutenant Beaver explained that OPD obtained the Bearcat armored vehicle around 2006, and that members of the SWAT team initially brought it to training for familiarization. Since then, the Bearcat has been used on nearly every callout of the SWAT team. In 2016, the department decided to allow PROs to deploy the Bearcat to incidents in the field absent a full SWAT callout, and the Bearcat was brought to PRO training so that PROs could become familiar with the vehicle and its characteristics. In response to questions about policy and training for supervisors and commanders on the use of the Bearcat, Lieutenant Beaver explained that there is no written policy on the use of the Bearcat, and that he is not aware of any formal training for supervisors or commanders on the use of the Bearcat at critical incident scenes.

Lieutenant Beaver was asked about the role of the PRO coordinator, and answered that the PRO coordinator is responsible for the overall administration of the program. It is the coordinator's responsibility to plan and schedule training, and ensure that PROs are properly qualified on their weapons system. The coordinator also ensures that the rifles are maintained and deals with any equipment malfunctions, as well as coordinating with the PRO instructors on proposed training objectives – typically based on trends seen in previous deployments or issues identified in critical incident debriefs.

Currently, PROs qualify quarterly, and cannot miss more than one quarterly training in a row – if they miss two sessions they are de-certified and cannot deploy the rifle until they attend another training session and re-qualify with the weapon.

The Board asked specifically about the PRO coordinator's responsibility to forward a PRO activity log to the Bureau Deputy Chiefs. Lieutenant Beaver replied that this is written in policy, but practice has since changed. When the SWAT team went to its current model of holding regular training and having one of the team leaders submit a training after-action report, the PRO training switched to this model as well. When the PRO program was established, the PRO's logbook was used to track deployments and provide justification for the cost of the program, the equipment, and the training time. After a time, the Deputy Chiefs decided that an after-action report from the quarterly trainings provided a better record of how the PROs were being trained and utilized. The logbooks are still used to track round counts for maintenance purposes. Lieutenant Beaver noted that, as PRO coordinator, he had not been forwarding an activity log to the Bureau Deputy Chiefs for at least five years. PROs are still required to fill out log books, and Sergeant S. Toribio created a spreadsheet to track the round count of each weapon for maintenance purposes.

Regarding the deployment of PROs, Lieutenant Beaver stated that, per DGO K-06, PROs are required to notify the Communications Division when deploying their rifles – the intent of this was so that a supervisor was aware that a rifle was being deployed. However, he added that if a supervisor was requesting that the PRO respond to the scene, then the need for the policy requirement has been met.

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

Lieutenant Beaver noted that PROs are trained to load their duty magazines with a full 30 rounds, but that this is not spelled out in a policy.

The Board asked about the training that PROs receive at quarterly training. Lieutenant Beaver replied that PROs receive scenario training including scenarios with armed subjects, such as simulating a yard search or a barricaded subject. The scenarios are designed to have various levels of outcome, from compliance to lethal force. PROs are also exposed to DAT training, including the possibility of having different force options available and the necessity for different roles on the DAT. Lieutenant Beaver stated that DAT training teaches tactics, techniques, and possible procedures, with the goal of setting guidelines on how to deal with various different scenarios.

In response to a question about PRO training on the Bearcat, Lieutenant Beaver replied that PROs are trained on retrieving the Bearcat from the substation and driving it, as well as working the doors, turret, and other accessories. PROs also get live-fire familiarization from the Bearcat, and are taught to keep in mind that the offset of the muzzle compared to the sights of their rifle must be considered when shooting to avoid striking the vehicle. SWAT team members get similar training, but the training is more frequent.

Lieutenant Beaver was asked about DAT training for SWAT team members. He replied that SWAT members are exposed to all of the different roles which exist in a DAT, and supervisors who are part of the team are given opportunities in training to supervise a DAT. During scenario training, this typically means that the person playing the team leader will gather the team, set the mission, explain the situation, and talk through the plan of action and possible contingencies.

In the field, Lieutenant Beaver explained, the manner in which a DAT team leader might brief the team is dependent on the circumstances of the event, including the proximity of the team to the incident and how much exigency exists in getting the team into place.

The Board asked if there was any training on self-deployment for PROs, or direction given on how a PRO might insert themselves into a DAT. Lieutenant Beaver explained that some scenarios are run where the students are introduced into the scenario at different times, to simulate as if they are arriving on scene during the course of an incident. PROs can put themselves into a DAT, although at some point they would need to be briefed by another team member or the team leader. PROs and SWAT team members are taught to play a utility role, available for a mission as needed, when they join with a DAT.

The Board asked a series of questions about SWAT team member training, specifically members of the entry element. Lieutenant Beaver stated that a supervisor or team leader of a DAT typically has only that job, which is to give assignments, plan for contingencies, take input, and control the team. The team leader may need to switch to a more active role, or take on another role, however, if the situation changes or an exigency presents itself.

The Board asked how sergeants on the SWAT team, and who are only operators and not supervisors while on the team, are expected to differentiate their behavior when they are in a

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

patrol or other uniformed setting as a supervisor. Lieutenant Beaver explained that, due to the training that SWAT members receive, they frequently take command of DATs in the field even if they hold the rank of officer, so for a sergeant the role of the team leader would not be any different.

Asked about whether no-shoot scenarios were trained in PRO or SWAT training, Lieutenant Beaver explained that they are, and there are scenarios where the subject possesses a firearm but can be taken safely into custody without force. This can be taught both in drills and using reality-based training, such as with simunitions. During these scenarios, officers are taught tactics, techniques, and procedures – tools with which to identify the threat and then plan for a safe and peaceful resolution. Some of these scenarios have included subjects who were sleeping or otherwise unconscious, and officers are taught to consider all different types of force options.

Lieutenant Beaver stated that his belief is that the Bearcat has been deployed by field personnel without a SWAT callout an average of once per week.

D. Command and Control

Lieutenant C. Shannon appeared before the Board as a subject matter expert on command and control of critical incidents. Lieutenant Shannon has been a member of OPD for 21 years, and spent time as an officer working in patrol, CID, and as a field training officer. After being promoted to Sergeant, Lieutenant Shannon worked as a patrol supervisor. Since being promoted to Lieutenant, he has worked as a commander in IAD, OIG, and the Special Operations Division (SOD) and has served as a patrol watch commander. He holds an ancillary assignment as a tactical commander for the Tactical Team (SWAT), and for the last seven years has worked on major incident planning and logistics for the department. Lieutenant Shannon has a bachelor's degree from UC Berkeley and has attended training given by the California Narcotics Officers' Association (CNOA), National Tactical Officers' Association (NTOA), Force Science Institute, and Americans for Effective Law Enforcement (AELE). Lieutenant Shannon currently teaches recruits in the academy and sworn members in CPT on officer-involved shooting and critical incident scene management. He reviewed the materials prior to his appearance before the Board.

The Board asked Lieutenant Shannon about training he received as a commander regarding the incident command system (ICS). He replied that most command officers at OPD attend basic ICS courses, and that as part of continuing professional training for command-level officers he co-instructed with former Lieutenant M. Reilly on command and control of critical incidents. Within this course, there is instruction for command officers on topics such as handling barricaded subjects, ways to manage critical incident scenes with patrol personnel, and factors which may necessitate a SWAT callout. This training includes concepts such as forming DATs and setting perimeters to contain dangerous subjects.

Lieutenant Shannon was asked to explain the role of the watch commander as incident commander of a scene where a subject is armed with a firearm. He replied that the watch commander is typically not the first officer on scene, so instead they should ensure that initial

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

steps, such as ensuring adequate response and making sure a supervisor is dispatched, occur. Next, the incident commander should begin ensuring that the scene is isolated, contained, and evacuated, dependent on the circumstances. For instance, if the location of the subject is known, having a DAT form may be the first priority, otherwise containment of the subject inside of a perimeter may take precedence. After the scene is contained, then formation of a DAT is typically the next main concern.

The Board asked whether the incident commander had a role in selection of DAT members and in setting their mission and tactics. Lieutenant Shannon replied that ultimately, as the person in command of the incident, the incident commander has full control and is responsible. In practice, this means that the incident commander approves concepts for a plan and sets tasks or missions for subordinate units, which are then tasked with executing those assignments. As such, the incident commander typically broadcasts general direction over the patrol radio to ensure that all personnel on that incident are informed of his or her direction.

Lieutenant Shannon spoke to the selection of a team leader for the DAT, and said that factors including that person's experience, their skill in handling whatever type of situation is being faced, and the incident commander's assessment of that team leader's decision-making processes all play a part in the choice.

In terms of the roles of officers within the DAT, and the incident commander's input or control over that level of detail within the team, Lieutenant Shannon said that, as with any command, there is an expectation of "trust but verify." He elaborated by saying that OPD assumes that a DAT will at minimum consist of a team leader, a talker/cuffer, a primary ("lethal") cover, and a less-lethal officer. The incident commander can safely assume that at the minimum these roles are filled, but then should also verify with the team leader that all the roles are filled and that the team leader has the requisite pieces needed to accomplish the team's mission.

In terms of the role of the team leader, Lieutenant Shannon explained that the DAT team leader is in charge of that team of officers, and is focused on leading and directing them. The focus of that team leader should not be any externalities, such as the perimeter or other assignments, as the DAT's main mission is to deal with the subject posing a threat and then plan for contingencies. The team leader is primarily responsible for forming the DAT, and the incident commander should be formulating the mission and intent of the DAT and communicating that to the team leader.

Asked specifically about a scenario with an armed and unconscious or unresponsive subject, and what resources he would want as part of a DAT, Lieutenant Shannon replied that there should be at least one – and possibly a second, depending on terrain – primary cover officer. Additionally, less-lethal options like the ECW or SIM, depending on the distance, should be present, as well as one officer assigned to communicate with and handcuff the subject. Ideally, there would be at least one additional officer as a utility to fill in if necessary or if an unexpected job arises.

The Board asked whether there might be a situation where a team leader might take over another role as part of the DAT. Lieutenant Shannon explained that this might happen, depending on the skill set of the team leader and whether an exigency presented itself. He cautioned that

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

unexpected or unknown factors could change and require swift action. Even without an exigency, Lieutenant Shannon noted that if there was a critical, unfilled need (such as no PROs, or no less-lethal trained officer) and the team leader had specific skills to fill that need, the team leader might need to take on both roles.

Asked if there was any formal documentation on the roles for a supervisor of a DAT, Lieutenant Shannon replied that there was none of which he was aware. He explained that the ultimate purpose and objective of the incident commander for most critical incidents is the preservation of life, the arrest of the subject, and the preservation of the crime scene. To achieve that, critical incidents typically require an inner and outer perimeter, command post, and a staging area for additional resources. As the criminal investigation continues, other tasks such as intelligence gathering, notifications to affected or interested parties, and marshalling of additional resources (such as air assets, public information officer, armored vehicle, SWAT, etc.) come to bear.

Regarding where the incident commander should be located during a critical incident, Lieutenant Shannon noted that the command post should ideally be within the outer perimeter but outside of the inner perimeter, and out of direct line of sight with the incident. The operational concept is to place the command post slightly removed so that the incident commander can maintain a more global perspective. In terms of additional resources that may need to be brought to the scene, such as the Bearcat, often the suggestion will come from on scene officers and then will be approved by the supervisor or commander on scene.

Specifically regarding the Bearcat, Lieutenant Shannon explained that, even if the Bearcat is brought to a scene where an incident commander is in charge, the team leader in charge of the DAT will likely be the person who gives direction as to how the Bearcat is positioned.

Lieutenant Shannon stated that, as situations change in a critical incident, the incident commander needs to stay abreast of these changes and modify the mission of the assigned personnel accordingly. If the mission is modified or replaced with a new directive, the incident commander is the one responsible for notifying the rest of the officers, typically via the radio.

VII.

USE OF FORCE ASSESSMENT

The Board assessed each use of force under *Graham v. Connor*, as well as the event(s) that led to each use of force.⁷ *Graham v. Connor* and its progeny require an assessment of the reasonableness of the officers' actions in light of the totality of the facts and circumstances confronting them, including the following three factors: “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.”⁸

⁷ *Graham v. Connor*, 490 U.S. 386 (1989).

⁸ *Id.* at 396; *Bryan v. McPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (the Graham factors are “not exclusive” and determining reasonableness requires examination of the “totality of the circumstances”).

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

A. Initial Investigation and Detention/Arrest Assessment

The Board assessed the initial attempts to detain Pawlik, in light of the facts known to the officers at the time of the incident. The Board reviewed the audio recording of the call for service, which was originally routed to the OFD dispatch center, where the caller reported that he saw a male subject unresponsive in between two houses, with an object in his hand that could have been a firearm. Based on this information, OPD officers were dispatched to the scene.

Officer Philips was the first on scene, and approached the area on foot where Pawlik was lying. Officer Philips, peering down the walkway between the two structures from the steps of 928 40th Street, observed Pawlik with a handgun in his right hand. Officer Philips saw that Pawlik was breathing, and did not have any apparent injuries, and reported his observations over the patrol radio. Based on the details given by the caller, plus the observations of Officer Philips confirming that Pawlik was armed with a handgun in his right hand, the Board determined that there was reasonable suspicion to detain Pawlik to investigate whether the handgun Pawlik was carrying was loaded in a public place, a violation of Penal Code § 25850(a).

Once the officers made their plan and the Bearcat arrived, Pawlik woke up. The officers gave several commands, which Pawlik did not follow. Notably, the officers gave several commands for Pawlik to drop the gun; instead, Pawlik raised the gun and pointed it in the direction of the officers. All four of the officers who shot Pawlik gave statements attesting to the fact that Pawlik pointed the handgun at the officers (a violation of Penal Code § 417(c)), as did Officer Philips. All of the officers were found credible by IAD, and the Board discussed that no evidence contradicts the officers' statements that Pawlik raised the gun and that it was pointed in their direction after failing to comply with commands to drop the gun. The Board noted that the video forensic analysis presented by CID and IAD confirmed that Pawlik lifted the handgun up and pointed it towards the officers, after he had been told to drop the gun. The Board determined that the officers, at the time of the use of force, had probable cause to arrest Pawlik for violations of Penal Code § 148(a) (Resist, Obstruct, or Delay Peace Officer) and Penal Code § 417(c) (Brandish Firearm in Presence of a Peace Officer).

Based on the totality of the circumstances, the Board determined that the detention and arrest of Pawlik was legal and within Department Policy.

B. Use of Force

The Board concurred with CID and IAD's assessment that five (5) separate officers utilized force during this incident. Four officers (Sergeant Negrete, Officer Berger, Officer Hraiz, and Officer Tanaka) used lethal force, while Officer Philips fired a less-lethal SIM from a shotgun. The Board analyzed PDRD video from the incident and observed that each officer who used lethal force fired all of their shots almost simultaneously, and that the total amount of time between the first round and the last round by all the officers was just under three seconds. Given the compressed timeframe of each use of force, plus the testimony of the subject matter experts regarding the way that officers are trained to fire when faced with a lethal threat (*i.e.*, to continuously shoot and assess the threat, and to stop shooting only when the lethal threat no

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

longer presents itself), the Board analyzed each officer's lethal use of force as a single event and decision.⁹

The Board reviewed each use of force independently, assessing the objective reasonableness of the force based not only on the *Graham v. Connor* Supreme Court precedent but also on OPD policy regarding the use of force. Discussion of each event follows:

1. Lethal Firearm Discharge Level 1, Type 1 (Sergeant F. Negrete)

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Sergeant Negrete when Sergeant Negrete fired his AR-15 rifle at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

The Board concurred that Sergeant Negrete reasonably perceived Pawlik as an immediate threat to Sergeant Negrete and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for Sergeant Negrete to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up, after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. At this point, Pawlik demonstrated an intent not to comply with the officers' commands, however, officers did

⁹ See *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014) ("It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended").

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

not use force. As officers continued to give commands to drop the gun, Sergeant Negrete reported that Pawlik looked at the officers, grasped the gun, and then raised it up and pointed it at him and other officers. Sergeant Negrete believed that this showed Pawlik's intent to fire the gun at him and the other police officers.

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, the OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

Means: The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sergeant M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sergeant Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)

- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sergeant Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying, a reasonable officer could conclude that Pawlik could have fired the handgun and struck Sergeant Negrete or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Sergeant Negrete used force, Pawlik made a sudden movement which was captured on Sergeant Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further evidence that Pawlik's hand, containing the handgun, was moving upwards from the

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

ground just before Sergeant Negrete used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that Sergeant Negrete used force, Pawlik's passive resistance (in failing to comply with the officers' orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers' orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says "OAKLAND POLICE DEPARTMENT" in large white letters on the side.

Based on the totality of the circumstances, the Board determined that Sergeant Negrete's use of force – firing seven lethal rounds from his AR-15 rifle at Pawlik – was reasonable under law and In Compliance with OPD Policy.

The Board also agreed with IAD's assessment that Sergeant Negrete properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that Sergeant Negrete fired his seven rounds in less than three seconds, and then stopped firing as Pawlik fell back to the ground. Sergeant Negrete re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

2. Lethal Firearm Discharge Level 1, Type 1 (Officer W. Berger)

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Officer Berger when Officer Berger fired his AR-15 rifle at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

The Board concurred that Officer Berger reasonably perceived Pawlik as an immediate threat to Officer Berger and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for Officer Berger to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. At this point, Pawlik demonstrated an intent not to comply with the officers' commands, however officers did not use force. As officers continued to give commands to drop the gun, Officer Berger reported that Pawlik sat up and appeared "agitated", as if the officers were bothering him. Officer Berger reported that Pawlik then laid down briefly before sitting up again and raising the right hand, holding the firearm, and pointing it directly at him. Officer Berger thought that Pawlik was going to shoot him.

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

- **Means:** The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sergeant M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sergeant Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sergeant Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying a reasonable officer could conclude that Pawlik could have fired the handgun and struck Officer Berger or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Officer Berger used force, Pawlik made a sudden movement which was captured on Sergeant Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further evidence that Pawlik's hand, containing the handgun, was moving upwards from the ground just before Officer Berger used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that Officer Berger used force, Pawlik's passive resistance (in failing to comply with the officers' orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers' orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says "OAKLAND POLICE DEPARTMENT" in large white letters on the side.

Based on the totality of the circumstances, the Board determined that Officer Berger's use of force – firing six lethal rounds from his AR-15 rifle at Pawlik – was reasonable under law and In Compliance with OPD Policy.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board also agreed with IAD's assessment that Officer Berger properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that Officer Berger fired his six rounds in less than three seconds, and then stopped firing as Pawlik fell back to the ground. Officer Berger re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

3. Lethal Firearm Discharge Level 1, Type 1 (Officer B. Hraiz)

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Officer Hraiz when Officer Hraiz fired his AR-15 rifle at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

The Board concurred that Officer Hraiz reasonably perceived Pawlik as an immediate threat to Officer Hraiz and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for Officer Hraiz to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up, after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. At this point, Pawlik demonstrated an intent not to comply with the officers' commands, however officers did not use force. As officers continued to give commands to drop the gun, Officer Hraiz reported that Pawlik appeared "agitated" and "upset", and appeared to know what was going on around him as he glanced back and forth between the officers. Officer Hraiz said that he saw Pawlik's grip on the handgun become firmer, and that Pawlik elevated the gun and pointed it directly at him. Officer Hraiz reported that he thought that Pawlik was a lethal threat.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, the OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

- **Means:** The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sergeant M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sergeant Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)
- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sergeant Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying, a reasonable officer could conclude that Pawlik could have fired the handgun and struck Officer Hraiz or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Officer Hraiz used force, Pawlik made a sudden movement which was captured on Sergeant Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further evidence that Pawlik's hand, containing the handgun, was moving upwards from the ground just before Officer Hraiz used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that Officer Hraiz used force, Pawlik's passive resistance (in failing to comply with the officers' orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers' orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says "OAKLAND POLICE DEPARTMENT" in large white letters on the side.

Based on the totality of the circumstances, the Board determined that Officer Hraiz's use of force – firing five lethal rounds from his AR-15 rifle at Pawlik – was reasonable under law and In Compliance with OPD Policy.

The Board also agreed with IAD's assessment that Officer Hraiz properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that Officer Hraiz fired his five rounds in less than three seconds, and then stopped firing as Pawlik fell back to the ground. Officer Hraiz re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

4. Lethal Firearm Discharge Level 1, Type 1 (Officer C. Tanaka)

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Officer Tanaka when Officer Tanaka fired his AR-15 rifle at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board concurred that Officer Tanaka reasonably perceived Pawlik as an immediate threat to Officer Tanaka and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for Officer Tanaka to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. Officer Tanaka reported that Pawlik initially appeared to be "scanning" the area, and that the arm holding the handgun was limp. At this point, Pawlik demonstrated an intent not to comply with the officers' commands, however officers did not use force. The second time that Pawlik sat up, Officer Tanaka believed that Pawlik was analyzing the situation, moving his head back and forth at the officers. Officer Tanaka reported that Pawlik was frowning and appeared "irritated", but appeared to understand the situation. Officer Tanaka said that Pawlik raised the handgun and pointed it directly at the officers, and Officer Tanaka felt that Pawlik was a lethal threat to himself, the other officers, and members of the public.

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, the OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

- **Means:** The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sergeant M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sergeant Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sergeant Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying, a reasonable officer could conclude that Pawlik could have fired the handgun and struck Officer Tanaka or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Officer Tanaka used force, Pawlik made a sudden movement which was captured on Sergeant Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further evidence that Pawlik's hand, containing the handgun, was moving upwards from the ground just before Officer Tanaka used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that Officer Tanaka used force, Pawlik's passive resistance (in failing to comply with the officers' orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers' orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says "OAKLAND POLICE DEPARTMENT" in large white letters on the side.

In regards to Officer Tanaka's use of force, the Board recognized that it had previously determined that Officer Tanaka had failed to properly advise over the radio that he was deploying his rifle (see the section ADDITIONAL ASSESSMENTS AND DELIBERATIONS, below). However, the Board determined that Officer Tanaka was still acting as a peace officer,

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

within the scope and in the course of his duties, when confronted with the threat posed by Pawlik, and that Officer Tanaka's failure to follow an administrative procedure did not have bearing on whether his use of force was objectively reasonable.

Based on the totality of the circumstances, the Board determined that Officer Tanaka's use of force – firing four lethal rounds from his AR-15 rifle at Pawlik – was reasonable under law and In Compliance with OPD Policy.

The Board also agreed with IAD's assessment that Officer Tanaka properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that Officer Tanaka fired his four rounds in less than three seconds, and then stopped firing as Pawlik fell back to the ground. Officer Tanaka re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

**5. Impact/Impromptu Weapon with Contact – Regardless of Injury Level 2, Type 12
(Officer J. Philips)**

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Officer Philips when Officer Philips fired a less-lethal SIM at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

The Board concurred that Officer Philips reasonably perceived Pawlik as an immediate threat to Officer Philips and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for Officer Philips to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up, after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. At this point, Pawlik

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

demonstrated an intent not to comply with the officers' commands, however officers did not use force. As officers continued to give commands to drop the gun, Officer Philips reported that Pawlik lifted his right hand, which was holding a handgun, and pointed the handgun in the direction of the officers. Officer Philips believed that Pawlik presented a lethal threat to the officers.

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, the OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all of the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

- **Means:** The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sergeant M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sergeant Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)
- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sergeant Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying, a reasonable officer could conclude that Pawlik could have fired the handgun and struck Officer Philips or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Officer Philips used force, Pawlik made a sudden movement which was captured on Sergeant Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

evidence that Pawlik's hand, containing the handgun, was moving upwards from the ground just before Officer Philips used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that Officer Philips used force, Pawlik's passive resistance (in failing to comply with the officers' orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers' orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says "OAKLAND POLICE DEPARTMENT" in large white letters on the side.

Based on the totality of the circumstances, the Board determined that Officer Philips' use of force – firing one less-lethal SIM at Pawlik – was reasonable under law and In Compliance with OPD Policy. The Board agreed that, although Pawlik presented a lethal threat to Officer Philips and Officer Philips could have used lethal force to defend himself and the other officers, the use of a lower level of force was also reasonable.

The Board also agreed with IAD's assessment that Officer Philips properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that Officer Philips fired one SIM round at Pawlik. By the time Officer Philips had worked the action of the shotgun and chambered another round, other officers had already shot and fatally wounded Pawlik. Officer Philips re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

VIII.

ADDITIONAL ASSESSMENTS AND DELIBERATIONS

Along with assessing this incident as explained above, the Board deliberated as to the following topics:

A. Internal Affairs Division Training and Policy Recommendations

As part of its far-reaching investigation and assessment of the entirety of the incident and the actions of OPD personnel before, during, and after the incident, IAD made a number of recommendations regarding training and policy that the Board considered and accepted:

- IAD recommended that the department-issued cell phones of all officers involved in a Level 1 force incident be collected by CID for possible analysis (see TRAINING POINTS AND DELIVERABLES, below);
- IAD recommended that the Department adopt clear guidelines on requesting forensic video analysis for PDRD, surveillance, or other evidentiary video for force incidents;
- IAD recommended that the Department develop and implement additional training on encounters with unresponsive armed persons as well as on reasonable contingencies to expect during critical incidents involving a DAT;
- IAD recommended various training reminders for several of the involved officers and other personnel who were on scene – the Board accepted all of these recommendations and ordered the training completed;
- IAD recommended that more training should be developed for sworn members on the use and deployment of the Bearcat;
- IAD recommended that SOD maintain a list of personnel who have been trained to operate the Bearcat;
- IAD recommended that CID develop and train all CID investigators on the decision-making process regarding what personnel are sequestered and interviewed after a Level 1 force investigation;
- IAD recommended that the information technology unit explore mounting a PDRD to the Bearcat (Sergeant I. Ramirez noted that this is already in progress) and explore improving the resolution of video from PDRDs deployed in the field;
- IAD recommended that CID update its investigation guidelines and protocols so that command officers overseeing a critical incident where Level 1 force is used are also interviewed.

B. Criminal Investigation Division Procedures

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board discussed the procedures followed by CID during Level 1 force investigations at length, and developed several recommendations to enhance future investigations of this type. The Board was adamant about ensuring that CID investigators have adequate training on sequestering and interviewing **all** involved officers in a Level 1 force incident, to include command and supervisory officers who may not have directly used force but were supervising or managing the incident.

The Board directed CID to develop training on several aspects of Level 1 force investigations, including on sequestering subjects. In this incident, officers on scene who used force were allowed to "self-select" the member who sequestered them, in some cases calling off-duty members to respond to the scene. The Board recognized that, although there was no evidence of impropriety in this case, this practice could lead to doubts about the integrity of the investigation, and the Board directed CID to review its policies and procedures on this issue, and develop training if appropriate.

The Board also noted that CID needed additional training on all aspects of lethal force investigations, to include reviewing and critically examining all pieces of evidence discovered during an investigation and resolving all discrepancies to the best of their abilities. In this incident, the autopsy report from the Coroner's Office medical examiner initially listed one wound on Pawlik's back as a gunshot entry wound, which was incongruent with the visual evidence from the PDRD as well as the statements of the officers. This was not resolved by CID investigators, and IAD had to re-contact the examiner to resolve the discrepancy. (The medical examiner, upon taking a second look, advised that this wound was likely an exit wound but was misidentified due to the ballistic characteristics of high-velocity rifle rounds.)

The Board directed CID to examine the lethal-force investigation protocols and practices of other, similar departments to ascertain whether there are best practices which might be adopted by the Department. The Board noted that CID faces a staffing challenge with Level 1 force investigations because the assigned investigator likely also has other homicide cases that he or she is investigating, which can affect how expeditiously CID can complete a Level 1 force investigation. The Board felt that any opportunities to identify best practices which might streamline or reduce the total investigation time, as well as enhance quality, should be explored.

C. Patrol Rifle Officer Program

The Board debated at length over aspects of the Patrol Rifle Officer Program, specifically in regards to the idea of officers "self-deploying" or otherwise taking the initiative to bring their unique weapons system and training to bear during a critical incident (much of this was precipitated by discussion on whether or not Officer Tanaka violated DGO K-06 by deploying his patrol rifle without advising the communications division).

The Board determined that the entire department needed to review training, policy, and practice on "self-deployment" and initiative-based tactics, to ensure that the flexibility of trained officers recognizing gaps in resources is not lost while at the same time maintaining incident management and control. To that end, the Board directed that additional training on this issue be explored.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

The Board also examined a divergence between policy and practice in regards to patrol rifle officers advising the Communications Division when deploying their rifles on a scene. The Board recognized that DGO K-06, *Patrol Rifle Program*, is outdated and needs revision.

D. Designated Arrest Teams

Stemming from the discussion of self-deployment, the Board examined training and practice surrounding the utilization of DATs. The Board noticed that, throughout SME testimony, the importance of communication between members of the DAT and between all officers on a critical incident scene was recognized. The Board saw that, in one instance, communication was done using a “slang” term – Officer Berger told Officer Philips that, if Pawlik moved the handgun he was holding, Officer Philips should “bag” Pawlik. Officers Berger and Philips both stated that they understood this to mean that Officer Philips should use a less-lethal SIM on Pawlik, and that this term was common to the Department. The SME, Sergeant Sotto, said that he had not heard this term, but that the word “thump” was common vernacular in the department to mean utilization of a less-lethal SIM. The Board recommended that training incorporate and train one plain-English term to ensure that, if used, all personnel would understand its meaning.

The Board also felt that additional training was needed for supervisors and commanders on the supervisory and leadership aspects of leading a DAT. The Board recommended that all members, regardless of rank, receive additional training on the roles and responsibilities of a DAT, and that supervisory and command staff receive additional training on top of that on the supervision and leadership of a DAT.

E. Equipment Issue and Customization

The Board identified a possible issue regarding one piece of equipment which was used during the incident: Sergeant Negrete’s PDRD and post-incident photos show that his AR-15’s magazine had a stenciled shamrock painted on it. Board member Captain Joshi explained that he was aware of information suggesting that certain white-supremacist fringe groups have co-opted this symbol as their own. The Board unanimously agreed that this symbol was not being used in that fashion in this case; instead, the Board recognized that members of the department’s SWAT team have shamrocks affixed to some items like magazines, uniform patches, or hats in honor of Officer William Burke, an officer born in Ireland who tragically took his own life in 2013. Nevertheless, the Board felt that persons un-familiar with Officer Burke or this tradition could misconstrue the presence of the shamrock on a piece of equipment worn or carried by a police officer.

The Board was made aware that many officers carry personally-owned rifle magazines, and some carry personally-owned handgun magazines as well. To rectify the above issue, the Board strongly recommended that the department purchase and outfit all members authorized to carry rifles with department-owned rifle magazines, which by policy should not be modified or defaced. Additionally, the Board recommended that a command directive be issued reminding all personnel that un-authorized symbols or slogans must not be worn on uniform items or affixed to equipment carried in the field.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

F. Initial Assessment of Misconduct and IAD Findings

As part of any Level 1 force investigation, the Internal Affairs Division completes a full assessment not only of the reasonableness of the force at the moment that it is used (as prescribed in *Graham v. Connor*), but also of the entirety of the circumstances including adherence to Department policy and procedure. During the initial convening of the Board, on November 28th and 29th, 2018, IAD's presentation included the results of their investigation and their recommended findings.

Command and Control – Lieutenant Yu – Initial IAD Findings

In every use of force investigation, the Department strives to examine not only the actions of the involved personnel, but also the supervisory and command accountability attendant to those actions. In this case, IAD examined the overall command and control of the scene by Lieutenant Yu, who was the BFO 1 watch commander at the time of the incident and was on scene acting as the incident commander.

IAD determined that Lieutenant Yu responded to the scene quickly, within ten minutes of the call being dispatched, and set up a command post to manage the incident. He ensured that a perimeter was set, called for resources, and appropriately delegated responsibilities to the sergeants on scene. IAD's initial assessment was that Lieutenant Yu appropriately managed the scene by meeting with Sergeant Negrete and approving Negrete's plan for resolving the issue. IAD felt that Sergeant Negrete lost supervisory control at a critical juncture of the incident, but this was not the fault of—nor under the control of—Lieutenant Yu, and that Lieutenant Yu's responsibilities had been appropriately carried out. IAD recommended a finding of **Exonerated** regarding the allegation that Lieutenant Yu failed to fulfill his command responsibilities (MOR 234.00-2).

Supervision – Sergeant Negrete – Initial IAD Findings

IAD initially found that Sergeant Negrete appropriately formulated a systematic and reasonable plan, and conveyed this plan to each member "in a clear and concise manner." He shared this plan with Lieutenant Yu and received approval. IAD also found that Sergeant Negrete appropriately positioned the members of the DAT, set up the Bearcat armored vehicle in a tactically sound manner, and had a step-by-step plan for taking Pawlik into custody. However, IAD stated that this plan relied on the assumption that the officers would have to wake Pawlik, and that planning did not account for any scenarios where Pawlik awoke on his own.

Just as the Bearcat was moved into position, Pawlik woke up and began moving, prompting the members of the DAT to start giving Pawlik commands. IAD, based on PDRD video and statements from the officers, determined that Sergeant Negrete became overly focused on directly engaging Pawlik. IAD found that Sergeant Negrete was looking at Pawlik, giving commands, and pointing his AR-15 rifle at Pawlik – IAD stressed that these were all appropriate reactions, but that there were others (such as Officer Berger and Officer Hraiz) who were in position to fill these roles and should have been doing this work while Sergeant Negrete took a more global view.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

IAD found that Sergeant Negrete taking the role of lethal cover, command-giver, and team leader at the same time resulted in the loss of effective control of the DAT. This meant that Sergeant Negrete was unable to supervise the members of the DAT, and he did not see Officer Tanaka get out of the Bearcat and deploy his patrol rifle, raising the number of "lethal" cover officers to four. While IAD noted that there is no limit to the number of officers who can provide lethal cover, the fact that there were at least two available and Officer Tanaka self-deployed without Sergeant Negrete becoming aware showed that Sergeant Negrete had lost supervisory control of the team.

Additionally, IAD noted that Officer Berger, not Sergeant Negrete, gave Officer Philips the direction to use a less-lethal SIM on Pawlik if Pawlik moved the gun. IAD felt that direction of this type was the responsibility of the team leader, and that Sergeant Negrete had allowed his control in that area to lapse by becoming overly focused on Pawlik and the threat he presented.

Based on the totality of the circumstances, IAD felt that Sergeant Negrete's loss of effective control in the crucial half-minute prior to the use of force was a failure to exercise the responsibilities of a supervisor as expected by the Department, and recommended a finding of **Sustained** for this allegation. IAD noted that the Department differentiates some forms of misconduct as class one (the most serious) and class two depending on whether the alleged conduct included "gross dereliction of duty." Allegations of failure to carry out the responsibilities of a supervisor are one of these forms of misconduct, and IAD initially found that Sergeant Negrete's misconduct was of the class two variety (MOR 285.00-2).

Use of Force – All Officers – IAD Initial Findings

As noted in section VII, **USE OF FORCE ASSESSMENT**, IAD's investigation found that all five of the uses of force identified and examined during their investigation were objectively reasonable under law and in accordance with OPD Policy. IAD recommended that all five force use incidents (MOR 370.27-1) be found as **Exonerated**.

Initial Board Deliberations – November 28th and 29th, 2018

When conducting its initial deliberations, the Board focused specifically on the issues of command and supervisory responsibility. In regards to the allegation that Sergeant Negrete failed to properly supervise the DAT, the Chair raised concerns that the allegation was improperly classified; instead of a class two allegation, the Chair suggested that the allegation should be viewed as class one. The Chair noted that there was an issue with Sergeant Negrete taking multiple roles (team leader, talker/cuffer, primary cover with a rifle), and that this contributed to his lack of supervision of the team. Additionally, the Chair noted his belief that Sergeant Negrete did not properly brief the DAT, and that his planning was insufficient. Given the outcome of this incident (the loss of Pawlik's life), the Chair believed that Sergeant Negrete's conduct did not take due consideration of the need to preserve life, and that as such the misconduct should be analyzed as a class one violation.

There was discussion, but no consensus, on this point. Rather than vote on IAD's recommendation, the Chair decided that additional interviews and work by IAD should examine

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

whether Sergeant Negrete's conduct was indeed grossly negligent, and thus a class one failure to supervise.

In regards to Lieutenant Yu's overall command of the scene, the Chair felt that, while IAD Investigator Sgt. J. Haney did an excellent overall job on his examination, the command and control of a critical incident should be analyzed by an investigator of the same rank or above as the subject member. Additionally, the Chair felt that Lieutenant Yu did not have a strong enough participatory involvement in the planning and running of the scene, which set the stage for the supervisory deficiencies of Sergeant Negrete to go unchecked. The Chair also questioned whether Lieutenant Yu was derelict in allowing the involved officers to self-select their own sequestering officers, and whether he exercised the required amount of control over the other sergeants on scene. After some discussion, the Board agreed to also direct IAD to re-evaluate whether Lieutenant Yu's conduct constituted misconduct and, if so, whether it was class one or class two misconduct.

Finally, the Board directed IAD to examine whether Officer Tanaka failed to perform his duty by not advising the Communications Division of his rifle deployment. The Board remanded the investigation back to IAD with the above specific investigatory goals, and set a re-convention date for the Board of the 7th or 8th of January, 2019.

G. Board Re-Convention – January 8th, 2019 – IAD Additional Analysis and Findings

IAD Presentation of Memorandum Regarding Additional Findings

As to Sergeant Negrete: Sergeant Haney presented to the Board and explained that the originally identified issues with Sergeant Negrete's supervision of the DAT on the date of the incident – as detailed on pages 125 and 126 of IAD's original report – were still present. Additionally, through interviews with SMEs, IAD found that Sergeant Negrete's failure to supervise the DAT was specifically characterized by his failure to plan for one of the three main roles of a DAT as trained by the Department.

Sergeant Haney advised that OPD training directs all OPD sworn members to prepare for at least these three main responsibilities of a DAT: 1) accept surrender of the subject; 2) prevent the subject's escape; and 3) react to exigent circumstances. IAD determined that Sergeant Negrete had adequate plans conceived and briefed for the first two responsibilities, but that he failed to have a plan in place for how the DAT should react to an exigent circumstance created by Pawlik. Sergeant Haney wrote that, "The potential for Pawlik to awaken and not respond to the officers' commands was a realistic possibility that should have been planned for." Given that Sergeant Negrete had additional training in DATs as a member of the Department's SWAT team, IAD felt that this failure to plan for a foreseeable exigent circumstance was a dereliction of duty.

However, Sergeant Haney asserted that IAD determined that, while Sergeant Negrete's supervision was lacking, his conduct did not rise to the level of gross dereliction of duty. Sergeant Haney quoted MOR section 175.99, which defines gross dereliction of duty, as saying that gross dereliction is "[f]ailure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

carelessness and a reckless disregard for the consequences of the member or employee's conduct."

IAD's examination of the evidence led them to the conclusion that Sergeant Negrete made a good faith effort to create a plan and take Pawlik into custody safely. While his planning and supervision were lacking, IAD felt that his conduct was not careless or reckless in its disregard for the consequences of his actions. IAD therefore recommended that its original finding of **Sustained** for a **Class Two** violation of supervisory responsibilities (MOR 285.00-2) stand.

As to Lieutenant Yu: Originally, IAD recommended that the allegation that Lieutenant Yu failed to properly command this incident be found as **Exonerated**. After additional investigation, IAD recommended that this be changed, and instead that Lieutenant Yu be found as **Sustained** for a **Class Two** violation of command responsibilities (MOR 234.00-2).

Sergeant Haney noted that Sergeant Negrete's plan (described above) failed to properly plan for a foreseeable contingency, namely an exigency caused by Pawlik. Through investigation into Lieutenant Yu's training history, IAD determined that Lieutenant Yu should have recognized that this planning was deficient when he was briefed on the DAT's plans by Sergeant Negrete. That Lieutenant Yu did not recognize and correct this deficiency, as the incident commander on scene, was derelict.

Sergeant Haney examined whether this failure constituted gross dereliction of duty, and determined that it did not. Sergeant Haney analyzed the actions that Lieutenant Yu did take towards resolving the situation – such as coordinating the scene management, placing the more experienced Sergeant Negrete in control of the DAT as opposed to one of the less-trained sergeants, setting up a command post, and requesting resources – and found that Lieutenant Yu made a good faith effort to manage the scene with the goal of reaching a peaceful conclusion. While his planning and management were lacking, IAD felt that his conduct was not careless or reckless in its disregard for the consequences of his actions. Therefore, IAD recommended a finding of **Sustained** for a **Class Two** violation of command responsibilities (MOR 234.00-2).¹⁰

As to Officer Tanaka: Sergeant Haney presented his conclusion that, while Officer Tanaka did not advise the Communications Division that he was deploying his rifle, this action did not constitute misconduct. Speaking with SMEs and reviewing the policy, Sergeant Haney determined that the purpose of the requirement for a PRO to advise the Communications Division of a patrol rifle deployment was to keep supervisors informed of resources when managing incidents. However, the policy requires this advisement when it is practical to do so. Sergeant Haney reviewed PDRD video which showed that, when Officer Tanaka was getting out of the Bearcat and deploying his rifle, Pawlik had already awoken and other officers were giving him commands. This was an emergency, and Sergeant Haney indicated that it would have been impractical for Officer Tanaka to get on the radio at this point to fulfill an administrative duty.

¹⁰ Pursuant to the Board's request, Sergeant Haney's analysis and recommendation was specifically reviewed and approved by IAD Commanders at the rank of Lieutenant and Captain.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

Shortly after deploying the rifle, Officer Tanaka used it as a means of lethal force. Sergeant Haney wrote that the spirit of the policy clearly did not imagine or require an advisement that the rifle was being deployed after a use of force had already occurred. Given the totality of the circumstances, Sergeant Haney and IAD recommended that Officer Tanaka's failure to advise the Communications Division about his rifle deployment be given the finding of **Exonerated**.

Deliberations as to Sergeant Negrete

The Chair opened the floor for discussion on IAD's recommendation that Sergeant Negrete's failure to properly supervise be found as **Sustained** and classified as **class two**.

Board member Captain Bolton stated that he agreed with IAD's finding. He opined that there was a lack of planning on Sergeant Negrete's part, and that this manifested itself in a variety of ways. One example that Captain Bolton specifically pointed to was the fact that multiple officers were giving Pawlik commands when Pawlik awoke, which Captain Bolton thought would have been curtailed or eliminated if Sergeant Negrete had properly supervised the DAT, as opposed to becoming too involved in the incident. However, Captain Bolton asserted that the lack of planning and supervision on the part of Sergeant Negrete did not create the exigency nor the use of force; instead, Pawlik's failure to follow commands of the officers and his pointing his handgun at the officers created a lethal threat which the officers had to defend themselves against.

The Chair disagreed and contended that Sergeant Negrete's conduct constituted gross dereliction of duty when examining the event in totality, and thus rose to a class one violation. The Chair cited a confluence of multiple failures which, when viewed in totality, were so inappropriate that they constituted gross dereliction. These included:

- Sergeant Negrete deploying his own rifle as part of the DAT, even though he had two officers already with rifles as primary cover officers;
- Sergeant Negrete taking the role of both team leader and talker/cuffer, which split his attention and did not allow him to effectively supervise the team;
- Sergeant Negrete's failure to plan for a foreseeable exigency – Pawlik awakening and refusing commands – did not meet the standard of a reasonable care to protect life;
- The outcome of this incident (Pawlik losing his life) was so severe that it had to be taken into consideration when determining whether Sergeant Negrete's conduct rose to the level of gross negligence.

Captain Bolton rejoined by saying that, although the result of the incident was extremely unfortunate, that result came about as a consequence of the actions of the subject, Pawlik. Captain Bolton proposed a thought experiment where all the actions were the same but instead Pawlik dropped the gun and was taken into custody without force. The same failures would have been present, and Sergeant Negrete's failures to plan would have still needed correction. But in that light, they would not have been considered gross dereliction of duty. As such, Captain

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

Bolton opined that the outcome should not be weighted to that degree, and that looking solely at Sergeant Negrete's actions in a vacuum they did not rise to a level of gross negligence.

The Chair respectfully disagreed, and shared his view that the outcome of this case was important, as a person lost his life. The Chair noted that OPD has seen a decrease in lethal force incidents because of a trend of good supervision and a desire to plan, create time and distance, and work towards peaceful resolution. In the estimation of the Chair, Sergeant Negrete's failures of supervision robbed the DAT of their abilities to utilize the superior tactics, equipment, and opportunities which could have changed the outcome of this incident. The Chair asserted that his vote was that Sergeant Negrete should be **sustained** for class one gross dereliction of duty in his failure to supervise the DAT (MOR 285.00-1).

Captain Bolton responded and respectfully disagreed with the Chair's assessment. Captain Bolton noted that, while the Chair felt that Sergeant Negrete did not make plans that created time or distance, the IAD investigation showed that a plan had been created and that this plan was, in the view of Captain Bolton, adequate for taking Pawlik into custody. The main issue was that plans for other exigencies were not discussed. Secondly, Captain Bolton took issue with the idea that the Bearcat armored vehicle was not used to its full capabilities, saying that, based on his understanding of the training regarding the Bearcat, there was no different way that he saw of using it.

The Chair responded by noting that, while Sergeant Negrete did create a plan and tell it to Lieutenant Yu, Sergeant Negrete did not follow that plan when Pawlik unexpectedly woke up, but instead got sucked into addressing the threat himself, losing supervisory control. Additionally, the Chair's assessment of the way that the officers were using the Bearcat based on the PDRD video was as a platform from which to shoot, and not as a piece of armor to shield themselves behind. These were deficiencies that were directly caused by Sergeant Negrete's failure to supervise, in the estimation of the Chair.

Board member Captain Joshi weighed in, saying that in his estimation there were too many mistakes made by Sergeant Negrete as a supervisor. While each of the issues – here Captain Joshi referenced Sergeant Negrete taking a primary cover role with his rifle, assigning himself the talker/cuffer role, and not adequately planning for contingencies – in and of themselves were not overly serious, put together they constituted a gross dereliction of duty. Captain Joshi also noted that, after the use of force incident, Sergeant Negrete was captured on PDRD reassuring other involved officers that they had no choice and "had to" use lethal force. Captain Joshi felt that this was also a factor which should be included in a decision as to whether Sergeant Negrete's actions were gross dereliction of duty.

Captain Bolton responded, again referencing that, while there is a subjective line between ordinary and gross dereliction of duty, his assessment of the incident was that Sergeant Negrete was making a good faith effort, and that his failure to properly supervise did not constitute gross dereliction. Additionally, he shared his belief that the conduct of Sergeant Negrete should be examined untethered from the outcome of the incident. Captain Bolton also referenced an example given by IAD of gross dereliction, which would have been if the supervisor had not even shown up to the scene but just monitored the incident via the radio, as an example of clear

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

gross dereliction of duty. The Chair and Captain Joshi disagreed, saying that this example was outside the bounds of reality and that the outcome of an incident must be factored in when making decisions about the conduct of the officers on scene.

The Chair called for a vote. The Chair and Captain Joshi voted to reject IAD's recommendation and instead sustain Sergeant Negrete for class one gross dereliction of duty for failure to supervise. Captain Bolton dissented, voting to uphold IAD's original recommendation to sustain Sergeant Negrete for a class two violation for failure to supervise. By a two-to-one vote, the Board recommended the following finding for Sergeant Negrete in regards to the allegation of gross dereliction of duty by failing to supervise:

Gross Dereliction of Duty – Supervisors – Responsibilities MOR 285.00-1 SUSTAINED

Deliberations as to Lieutenant Yu

The Chair opened the floor to discussion regarding whether Lieutenant Yu failed to properly command the scene as incident commander.

Captain Bolton discussed his assessment that the most important aspect of the failure to command was that the three main responsibilities of a DAT (arrest subject, prevent flight, react to contingencies) were not properly addressed, and that Lieutenant Yu did not rectify this. Additionally, troubling was the fact that Sergeant Pierce, who was on scene and purportedly in charge of the rear perimeter, stated in her interview that she did not know who the incident commander was. For Captain Bolton, this spoke to a larger theme that there was a lack of firm communication to all involved members as to exactly what the plan was from the incident commander.

Captain Joshi agreed with Captain Bolton, and said that, while the failures exhibited in the events leading up to the use of force were properly addressed, there were failures after the use of force – such as the issues with officer sequestration – which were the fault of Lieutenant Yu. Captain Joshi also said that Lieutenant Yu should have seen Sergeant Negrete carrying a rifle and told Sergeant Negrete to store the rifle and concentrate on leading the DAT.

The Chair called for a vote. The Board unanimously agreed with IAD's updated finding that Lieutenant Yu failed to properly command the incident, and agreed with the IAD recommendation:

Commanding Officers – Responsibilities MOR 234.00-2 SUSTAINED

Deliberations as to Officer Tanaka

The Chair opened the floor to discussion regarding whether Officer Tanaka failed to advise of his deployment of the patrol rifle and whether that failure was an acceptable deviance from policy.

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

Captain Joshi discussed his concern that, without this notification, the incident commander (Lieutenant Yu) was deprived of a piece of information which could have informed his decision making, namely the number of rifles which were deployed.

Captain Bolton expressed his assessment of the SME interviews as showing that PROs are trained with the expectation that they take initiative and adapt to the situation at hand. While the policy says that PROs are required to advise the Communications Division when they deploy their rifles, Captain Bolton expressed misgivings as to whether this is an expectation that is being conveyed in training. Additionally, Captain Bolton agreed with IAD that it was not practical to announce the deployment when Officer Tanaka was emerging from the Bearcat, as the situation was already critical and the administrative announcement over the radio would not have been appropriate.

Captain Joshi rejoined by stating that Officer Tanaka had ample time to advise that he was bringing his patrol rifle with him when he obtained the Bearcat from the Eastmont substation, and that his moving of the rifle from his patrol vehicle to the Bearcat was tantamount to deploying the rifle (and thus required an advisement). Although it is clear that only PROs and SWAT team members can bring the Bearcat to the field, and they likely will bring their rifle with them if they are doing so, Captain Joshi submitted that it cannot be assumed that the officer will deploy the rifle once arriving at the scene in the Bearcat.

The Chair agreed with Captain Joshi. The Chair submitted that the policy clearly requires the PRO to advise when he or she is deploying the rifle, and that Officer Tanaka's movement of his rifle from his patrol car to the Bearcat at the Eastmont substation constituted a deployment. As such, Officer Tanaka had ample time while driving to the scene to advise over the radio that he was deploying his rifle and was therefore in violation of the policy.

The Chair called a vote. Captain Joshi and the Chair voted to reject IAD's recommendation and instead sustain Officer Tanaka for failure to perform his duty by not following the direction of the policy. Captain Bolton dissented and voted to uphold IAD's recommendation that, although Officer Tanaka did not advise that he was deploying his rifle, Officer Tanaka be exonerated as it was not reasonable to do so. By a vote of two to one the Board recommended the following finding in regards to Officer Tanaka:

Performance of Duty – General	MOR 314.39-2	SUSTAINED
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Acceptance of IAD's Findings Regarding the Uses of Force:

As noted in section VII, **USE OF FORCE ASSESSMENT**, IAD's investigation found that all five of the uses of force identified and examined during their investigation were objectively reasonable under law and in accordance with OPD Policy. IAD recommended that all five force use incidents (MOR 370.27-1) be found as **Exonerated**.

After the above deliberations, the Chair called for discussion and deliberation on the force. As a result of these deliberations, the Board agreed with the above IAD recommended findings regarding the five uses of force.

CONFIDENTIAL

**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

IX.

TRAINING POINTS AND DELIVERABLES

All Training Points will be included in the Fourth Quarter 2018 Information Bulletin concerning Force Review Board Training Points and Information Updates. This Bulletin will be completed by the Policy and Publication Unit by January 31st, 2019.

TRAINING AND DELIVERABLES

TRAINING POINTS AND DELIVERABLES		
Deliverable	Responsible Unit	Owner
CID will develop training and collection protocols for obtaining department-cell phones from members involved in a Level 1 force incident.	FRB	CID
The Training Division will develop additional training for all sworn members on handling incidents with unconscious, armed subjects.	FRB	Training Division
CID will ensure that previous training from EFRB board #17P-0064, regarding properly identifying subjects to interview, is conducted. Further, CID will develop and administer additional training on sequestration of members involved in level 1 force incidents.	FRB	CID
CID will ensure that guidelines for level 1 force incidents are updated so that command officers who actively manage incident scenes are sequestered and interviewed.	FRB	CID
CID will look into the best practices on lethal force investigations from other departments, and will integrate any improvements into training for level 1 force investigators.	FRB	CID
IAD will ensure that all subjects that they feel should be interviewed in the course of a level 1 incident are interviewed, and will investigate the circumstances if it is found that a key member was not interviewed by CID.	FRB	IAD

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

DGOs I-19 and K-06 will be added to the list of policies that need revision. I-19 must have seizures of cell phones in level 1 investigations spelled out, whereas K-06 must bring the policy into alignment with PRO training.	FRB	Planning and Research
The Training Division will create additional training on DATs for all sworn members, to include roles, responsibilities, contingencies, plain-English commands and communication, and supervisory responsibilities. This training will include information and considerations regarding self-deploying into an established DAT or critical incident scene.	FRB	Training Division
If a command officer's performance is being evaluated in an overall incident investigation, IAD will ensure that an IAD command officer is part of the interview process and is evaluating the assessment of that commander for the purpose of the final report.	FRB	IAD
Department-wide direction from the Executive Team will be disseminated reminding members to refrain from putting unauthorized symbols or writing on equipment or uniform items.	FRB	OCOP
The Special Operations Division will coordinate the purchase and distribution of ample rifle magazines, of both 30 round and smaller capacities, for PROs and SWAT team members.	FRB	SOD
Officer Philips will receive training on maintaining a constant visual on armed suspects until it is safe to move.	IAD	Officer Philips' Chain of Command
Officer Berger will receive training regarding the importance of having the DAT team leader give all direction to team members, as well as training on loading his rifle magazines to capacity before deploying.	IAD	Officer Berger's Chain of Command
The Training Division will formulate additional training for all sworn personnel on use of the Bearcat, which will include supervisory and command considerations.	IAD	Training Division

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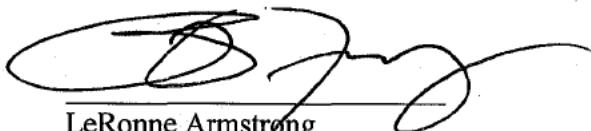
**EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19**

The Special Operations Division will create procedures on the use of the Bearcat in the field, and will maintain a list of all officers trained in operating the Bearcat.	IAD	SOD
The information technology unit will explore increasing the resolution of PDRD video, and will continue with their project to mount PDRDs to the Bearcat.	IAD	ITU
Lieutenant Yu and Sergeant Jim will receive training on properly identifying officers who need to be sequestered after level 1 force incidents.	IAD	Respective Chains of Command
Officer D. Vantree will receive training on how to properly sequester an officer after a level 1 force incident.	IAD	Officer Vantree's Chain of Command

CONFIDENTIAL

EXECUTIVE FORCE REVIEW BOARD
OAKLAND POLICE DEPARTMENT
Use of Force No.: 18F-0067
28-29 November 18, 8 January 19

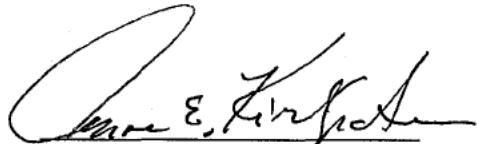
Reviewed and approved,



LeRonne Armstrong
Deputy Chief of Police

Agree with EFRB report

Disagree with EFRB report



Anne E. Kirkpatrick
Chief of Police

2-8-2019

Date

I agree in part and disagree
in part. My findings are attached
along with an addendum.

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